

## REMARKS

Initially, Applicants appreciate the Examiner's recognition that dependent claims 17 and 19-20 are free of the prior art and will stand allowed if rewritten in independent format to avoid the informal rejections. Claims 1-20, as amended, and new claim 21 are pending for the Examiner's review and consideration. Claim 1 has been amended to clarify that the "regular" chewy candy referred to is simply a corresponding conventional chewy candy, and that the analogue is in a predominantly glassy state (Specification at page 5, lines 30-31). Claims 4 and 12 have been amended to remove the "such as" language and several other materials that are already included in a recited genus. Claim 17 has been written in independent form to include the features of all claims from which it previously depended. Claims 19-20 depend from claim 17. As such, claims 17 and 19-20 now stand allowed. New claim 21 depends from claim 7 and recites a preferred embodiment where the chewy candy or confectionery analogue is disposed over a frozen food product to form a coating thereon (*See, e.g.*, Specification at page 14, lines 29-31 and page 15, lines 5-6). As no new matter has been introduced, it is believed that this Amendment should be entered at this time.

Claims 1-20 were rejected under 35 U.S.C. § 112, second paragraph, as being indefinite for the reasons set forth on page 2 of the Office Action. Claim 1 recites "regular" and "ambient," which the Office Action rejects as being relative, and the Office Action proposed "corresponding" as suitable alternate language for regular. Applicants agree that this language clarifies the recited invention, and hereby adopt this. With respect to the term "ambient," this indeed refers to typical room temperatures of about 72°F. The Office Action states that normal cold storage and distribution temperatures is -30°C on page 11 of the specification. While page 11 does not contain this information, the Examples and Comparative Examples do indicate that the normal cold storage temperature for ice cream and frozen confections is, *e.g.*, -30°C.

Claims 4 and 12 are alleged to be indefinite due to the language "such as." Applicants have amended the claims to remove this language. Additionally, the claims have been amended to remove the materials of caramels, toffees, fudges, and fondants since these are generically covered by the recited phrase "boiled sugar sweets" as acknowledged by the Office Action. Further, claims 18-19 were rejected for having indefinite amounts. These have been amended to clarify that the materials are present in the analogue in an amount as requested by the Examiner. Claim 14 was objected to for reciting "substantially free of crystalline structure," while claim 1 recites a glassy state. These terms are indeed, different,

as noted in the Specification at page 5, and claim 1 has been amended to clarify this distinction by reciting that the chewy candy or analogue is in a predominantly glassy state. Therefore, the objection as to claim 14 is believed to be inapplicable since claim 14 does indeed further limit claim 1. For these reasons, this rejection under 35 U.S.C. § 112, second paragraph, is believed to have been overcome, and Applicants respectfully request reconsideration and withdrawal thereof.

Claims 1-16 were rejected under 35 U.S.C. § 102(b) as being anticipated by U.S. Patent No. 5,011,704 to Smagula et al. ("Smagula") on page 4 of the Office Action. The Office Action states that Smagula teaches a thick-yet-flowable gooey viscosity fudge sauce that maintains this state at -12°C down to -18°C, and that this closely approximates its conventional counterparts at warmer temperatures. In particular, it is alleged that these can be part of a ready-to-eat dessert including components of ice cream or chocolate flavoring, and can also include 1-10 % palm oil and saccharides including 30-55% corn syrup. The Office Action further alleges that these fudge sauce confections would inherently exist in a glassy state, *i.e.*, frozen and non-crystalline, which would fall into the property of "a chewy transition temperature."

Initially, Applicants note that the freezing point of these sauces is depressed so that they are not actually "frozen" as alleged by the Office Action. Indeed, Smagula teaches that the freezing point is preferably depressed to less than -18°C (Col. 3, lines 23-24). The fact that Smagula teaches a distinction between frozen and non-frozen states, and indicates that its products do not attain a predominantly glassy state at normal cold storage and distribution temperatures for ice confectioneries, as presently recited. Thus, Smagula fails to disclose or even suggest a glassy state. Further, Smagula teaches that its products maintain a relatively stable viscosity from freezer to room temperature (Col. 3, lines 15-16). On the contrary, the present invention recites a product having a predominantly glassy state at cold storage and distribution temperatures, *e.g.*, a product that is brittle and fractures easily, and having a chewy transition temperature from about -15°C to 0 °C, *e.g.*, a product that becomes chewy in the mouth. Smagula not only fails to disclose each and every recited feature, it also teaches away from the claimed invention by teaching a relatively stable viscosity that suggests similar organoleptic properties over a wide range of temperatures.

Importantly, Smagula teaches sauces having a flowable consistency over a wide temperature range (Col. 1, lines 7-10; *see also* Col. 2, lines 14-18 and 30-37; Col. 3, lines 10-16). Smagula's sauces are flowable at freezer temperatures, such that it cannot teach a predominantly glassy state at normal cold storage and distribution temperatures as presently

recited. "Glassy state" materials tend to fracture upon deformation (*See, e.g.*, Specification at page 11, lines 6-18), however, Smagula's materials clearly flow and do not fracture.

Moreover, the predominantly glassy state chewy candy and analogues of the claimed invention do not have noticeable flow properties (*See, e.g.*, Specification at page 12, lines 29-36). Indeed, Smagula's sauces have a thick-yet-flowable, "gooey" viscosity (Col. 2, line 29) at a wide range of temperatures. Smagula fails to disclose or even suggest a material that changes states upon chewing and warming in a consumer's mouth--much less one having a predominantly glassy state, as presently recited. Simply because Smagula mentions one embodiment where "the sauce should be thick enough to support a stick" does not provide a teaching that the sauces can change states at a chewy transition temperature, as presently recited. Moreover, simply because the sauce can be thicker does not teach that it is no longer flowable--Smagula makes expressly clear that its invention is entirely directed to sauces that exhibit a flowable consistency over a wide temperature range.

Smagula teaches read-to-eat dessert products including a chocolate covered ice cream product where the flowable fudge sauce is the center surrounding the stick, which is typically made by injecting sauce to form a center-filled ice cream product (Col. 2, line 66 to Col. 3, line 2; and Col. 5, lines 42-66). Smagula does not teach that its sauces can form an outer portion of a food product--they are simply too flowable and not designed for this purpose. Thus, Smagula fails to teach chewy candy or sugar confectionery analogues having a predominantly glassy state at normal cold storage and distribution temperatures, which glassy state is not flowable, as presently recited. Moreover, new claim 21 recites the frozen food product having a coating of the chewy candy or sugar confectionery analogue. Smagula's sauces would flow and thus, it cannot teach a sauce that forms a coating on a frozen food product, as presently recited.

Additionally, Smagula fails to teach, even inherently, an ERH of at least about 70%, as presently recited. The methods Smagula employs to form its sauces differs significantly from those used to provide the claimed invention. Smagula teaches a process for preparing its sauces that combines various liquids, then solids, at high temperatures and then cools the product to 15°C for packaging (Col. 5, lines 17-31). On the contrary, the present invention surprisingly achieves the claimed ERH by water content reduction prior to formation of the predominantly glassy state so that a glassy solid can be obtained without freezing into a conventional crystalline formation (*See, e.g.*, Specification at page 12, line 22 to page 13, line 21). Since the claimed chewy candy or analogues are prepared using at least different processes compared to Smagula, Smagula cannot be alleged to inherently teach the

claimed ERH. Thus, since Smagula fails to disclose each and every feature of the claimed invention, it cannot anticipate the claimed invention. For these reasons, the rejection under 35 U.S.C. § 102(b) should be reconsidered and withdrawn.

Claims 1-16 and 18 were rejected under 35 U.S.C. § 103(a) as being obvious over to Smagula in view of the combination of articles entitled "Food Product Design: Ice Cream Inclusions," (1994) by Kuntz ("Kuntz") and "Sugar Confectionary and Chocolate Manufacture" by Lees et al. ("Lees") on pages 5-6 of the Office Action. The Office Action states that Kuntz teaches various ice cream inclusions and that a corn sweetener reduces the freezing point and the icy content. Kuntz also states that various materials can be made chewy with a fairly high partially hydrogenated vegetable oil level. Lees is stated to teach various syrup and crystal phases regarding the sugar content of sugar confectionaries and chocolates, and at page 357-359 teaches how to calculate the ERH of a confection. Thus, it is alleged to have been obvious how to modify the formulations of Smagula to adjust the texture.

Initially, Applicants point out the various deficiencies of Smagula previously discussed, which the secondary references Kuntz and Lees fail to remedy--even in combination. Even if Smagula included chewy materials, this still fails to teach the claimed invention. The present invention surprising and unexpectedly teaches chewy candy and sugar confectionery analogues have a chewy transition state achieved during consumption, and that prior to that they are in a predominantly glassy state at normal cold storage and distribution temperatures. The chewy materials of Kuntz are merely cumulative to the gooey sauces of Smagula, and even the combination fails to teach these claimed features--in particular the predominantly glassy state and the chewy transition state. Since the materials of Smagula and Kuntz are already chewy, gooey, and/or flowable, they do not teach the presently recited chewy transition state. In fact, Smagula *teaches away* from the presently recited chewy transition state because it teaches sauces having the same flowable texture over a wide temperature variation.

Moreover, the fact that Lees teaches how to readily calculate ERH does not provide one of ordinary skill in the art with any motivation or reasonable expectation of success to modify Smagula to include the chewy materials of Kuntz. Even if the motivation to do so existed, the flowability of Smagula precludes a reasonable expectation of success that the surprisingly and unexpectedly predominantly glassy state of the present invention could be achieved simply by modifying the texture of Smagula's fudge sauce. Furthermore, nothing in the combination of references suggests --even if a motivation to provide a chewier

or less chewy texture existed--that a dual state material could be provided that is predominantly glassy and undergoes a chewy transition during consumption, as presently recited. The present invention is not simply reciting a material with a chewy texture at cold temperatures--it is surprisingly and unexpectedly reciting a material that is in a predominantly glassy state to facilitate rapid transformation into a chewy material in a chewy transition state. Moreover, the ERH was achieved through a different process than taught by Smagula, and different products were thus obtained having the surprising and unexpected characteristics of the claimed invention. Thus, Applicants respectfully request that the rejections under 35 U.S.C. § 103(a) be reconsidered and withdrawn, since no *prima facie* case of obviousness has been stated.

In view of the above, all rejections have been overcome and should be withdrawn. Accordingly, the entire application is believed to be in condition for allowance, early notice of which would be appreciated. Should the Examiner not agree, then a personal or telephonic interview is respectfully requested to discuss any remaining issues and expedite the eventual allowance of the claims.

Respectfully submitted,

12/12/03  
Date

Jeffrey A. Wolfson  
Jeffrey A. Wolfson (Reg. No. 42,234)

**WINSTON & STRAWN LLP**  
Customer No. 28765

202-371-5770